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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 212

PATRICK HENRY, DAVID D. LARSEN, STEWART B. KETT, JAMES B. GLENN, JR., d/b as SUBURBAN BROADCASTERS,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 26, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Patrick Henry, David D. Larsen, Stewart B. Kett, James B. Glenn, Jr., d/b as Suburban Broadcasters, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court below (Appendix, pp. 1a to 5a) is officially reported in 302 F. 2d 191 (U.S. App. D.C. 1962). The decision of the Federal Communica-

tions Commission (J.A. 52-55)[1] is reported in 20 Pike & Fischer, Radio Regulations 951 (1961).

JURISDICTION

The judgment of the Court below was entered on March 29, 1962, Appendix, p. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's denial, based upon a finding that Appellant's program proposal was not "'designed' to serve the needs of Elizabeth," and that no investigation of the needs of the area had been made, is, in reality, censorship of these proposals and specifically violates the provisions of Section 326 of the Communications Act of 1934, as amended, and deprives Petitioner of the protection of the First Amendment guaranteeing freedom of speech.

2. Whether the Commission has the statutory authority to inquire into the needs of the area proposed to be served by the applicant, to pass judgment upon the adequacy of the applicant's proposed programming to meet these needs, and to deny the application for failure to investigate these needs.

STATUTES INVOLVED

The First Amendment of the United States Constitution and the relevant portions of the Communications Act of 1934, as amended, 48 STAT. 1064, 47 U.S.C. § 151, *et seq.*, are set forth in the Appendix, pp. 6a to 7a.

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[1] Reference is to the page of the Joint Appendix in the Court below.

STATEMENT

Petitioner filed its application for a construction permit for a new FM station on July 10, 1959, and on August 7, 1959, it was accepted for filing by the Commission. On December 22, 1959, the Commission issued an order setting the application for hearing on technical engineering issues only and, except for the facts involved in these issues, found that Petitioner was legally, technically, financially and otherwise qualified to construct and operate the instant proposal. Metropolitan Broadcasting Corporation, the licensee of Station WNEW-FM, New York, New York, was made a party to the proceeding because of the potential interference to it by the proposed station. No competing application for the same facilities was involved.

On the request of Metropolitan Broadcasting Corporation and over the opposition of Petitioner, the Commission on May 23, 1960, released a Memorandum Opinion and Order, adding the following issue to the hearing:

> "To determine whether the program proposals of Suburban Broadcasters are designed to and would be expected to serve the needs of the proposed service area." (J.A. 11).

The evidentiary hearing on this issue was held on July 12, 1960, and the record closed on that date. To meet the issue, Petitioner introduced an exhibit (R. 264-280)[2] which described in detail the content of each program proposed to be broadcast by Petitioner's station.

On the basis of Petitioner's direct testimony, the Commission's Broadcast Bureau concluded in its "Pro-

[2] Reference is to the page of the record in the Court below.

posed Findings and Conclusions" that ". . . the programs proposed by Suburban are 'designed to and would be expected to serve the needs of the area'," and that ". . . the public interest, convenience, and necessity would be served by a grant of . . ." Petitioner's application. (R. 353, 357)

On October 6, 1960, the Examiner released an Initial Decision granting Petitioner's application. He found that Petitioner's program proposals were copied from an earlier application filed for an FM station at Alameda, California, and were prepared by Petitioner's partners without any discussion with anyone in Elizabeth. (J.A. 37-38). The Examiner emphasized that the program issue was limited in scope and simply contemplated a determination as to whether Petitioner's program proposals ". . . are 'designed' to serve the 'needs' of the proposed service area . . ." and ". . . 'would be expected' to serve these needs. . . .", (J.A. 43). He then concluded that Petitioner had met the issue. (J.A. 45).

Metropolitan filed exceptions to the Initial Decision on November 21, 1960. (R. 399-417). With respect to the programming issue, the Broadcast Bureau excepted only to the Examiner's ruling that the Commission's Policy Statement[3] is not applicable to applicants for new broadcast facilities. (R. 397). The Broadcast Bureau contended that the policy was applicable to new applicants but that, in this case, Petitioner's principals, ". . . who have had broadcast experience, determined upon a programming framework within which they would formulate specific programs

[3] *Report and Statement Of Policy Re: Commission En Banc Programming Inquiry* 20 Pike & Fischer, Radio Regulations 1901 (July 27, 1960).

to meet the particular needs of the community and area." (R. 432). In other words, the Broadcast Bureau advised the Commission that, in its opinion, Petitioner had met the programming issue and that the Examiner had correctly decided that Petitioner's application should be granted.

Petitioner, in lieu of formal exceptions, filed a "Statement In General Support of Initial Decision," in which exception was taken to all of the Examiner's conclusions and remarks having to do with the Policy Statement on the basis that contentions with respect thereto were irrelevant, immaterial and beyond the scope of the issues. In this statement, Petitioner again questioned the materiality and legality of the programming issue.

On July 5, 1961, the Commission released its Final Decision (J.A. 52-55) in which it concluded that the interference and other engineering considerations did not bar a grant of Petitioner's application, but that the application should be denied because Petitioner had not investigated the needs of the area prior to filing its application and because ". . . Suburban's program proposals were not 'designed' to serve the needs of Elizabeth." (J.A. 54).

Upon appeal, the Court below concluded that the case was controlled by this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 87 L. Ed. 1344 (1943) and that issues of the statute's proscription of censorship and the constitutional guarantee of free speech raised by Petitioner were not involved in the instant case. In affirming the Commission's decision, the Court of Appeals stated:

> "As we see it, the question presented on the instant record is simply whether the Commission

may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with is particular needs and an effort to meet them." Appendix, p. 5a.

REASONS FOR GRANTING THE WRIT

This case raises important and far-reaching issues involving an extraordinary claim by the Commission of the power to control the business and programming of broadcast stations. This is the first instance that the Commission has ever asserted the authority, in a non-comparative proceeding, to deny an application of an applicant found to be legally, technically, financially and otherwise qualified to be a licensee solely because of programming reasons.[4]

The importance of this decision can also be illustrated by the repeated references made thereto by the Chairman of the Commission in his recent speeches[5]

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[4] "For the first time, the Commission denied an application for a new broadcast station solely on the grounds of inadequate programming preparation. On June 28, 1961, it turned down the application of Suburban Broadcasters for a new FM station at Elizabeth, N. J., because it failed to determine the programming needs of the community intended to be served." (Federal Communications Commission, *27th Annual Report*, Fiscal Year 1961, Page 38).

[5] "Let me recall with you some of these vital words in the Commission's 1960 Programming Policy Statement, a policy which only last week won the approval of the Court of Appeals in the *Suburban* decision. Our 1960 Statement says:

> 'The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of responsibility to others.'"

Address by Newton N. Minow, Chairman, Federal Communications Commission, April 3, 1962, Mimeo No. 18306, Page 11.

and annual report.[6] This decision is also the basis for a proposed new set of program requirements in applications that will require the applicant to demonstrate his knowledge of the area, the needs of the area, and how he is meeting these needs.[7]

A. The Commission's Action Constitutes Censorship

The First Amendment of the Constitution and Section 326 of the Communications Act of 1934, as amended, prohibit the Federal Communications Commission from censoring the programs of a broadcast station. The Court below held that the Commission's action did not constitute censorship but was fully in accord with this Court's ruling in *National Broadcasting Co.* v. *United States, supra.* The Court of Appeals stated that this Court had held that ". . . the Commission may impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community." Appendix, p. 5a

It is submitted that the lower Court has extended the ruling in the *National Broadcasting Co.* case far beyond its original scope and has, in effect, emasculated Section 326 of the Communications Act and unconstitutionally restricted the First Amendment's application to broadcasting. The fact is that the action of the Commission does constitute censorship and such an assertion of power by an administrative agency should not be accepted without the specific approval of this Court.

The issue added by the Commission required a conclusion that the program proposals would or would not

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[6] See Note 4, *supra.*

[7] *Id.* at 41.

serve the needs of the proposed service area. The Commission's denial of the application answered the question posed by that issue in the negative—i.e., it concluded that the programs *were not* designed to and *would not* be expected to serve the needs of the proposed service area. The statements of the Commission, cited by the Court below, are merely the reasons why the Commission concluded that the proposed programming would not serve the needs of the area. No matter how the decision may be rationalized, the Commission denied a license application because it could not affirmatively find that the programming would meet the needs of the proposed service area.

The result of granting this power to an administrative agency is patent. First, the agency can require a showing of needs which must meet its approval. Second, it can require a showing that the proposed programming will meet these needs. It obviously follows, therefore, that the agency has acquired the means to compel an applicant to present programs in accord with the agency's beliefs. The broadcaster's right to give the public what he believes it wants, what he thinks will find acceptance in the free and open market, is forever lost.

Moreover, the practical impact of the decision on administrative procedures and freedom of speech should not be ignored by this Court. The right of an agency to approve the applicant's or licensee's showing of need gives it a method to use in compelling adherence to its views without taking any action that can be appealed to the Courts. It can address repeated letters to a broadcaster demanding explanations for failure to recognize alleged needs; it can require further investigations to justify what the Commission believes

to be unpopular or unconventional programming;[8] and it can threaten extended investigations and hearings unless changes are made. All these actions will invariably result in complete capitulation by the broadcaster to the views of the Commission rather than risk further harassment and extended and expensive hearings. Such practical program supervision can legally exist only by virtue of the authority asserted for the first time in this case.

A requirement that newspapers or magazines must demonstrate the needs of the area and describe how they intend to meet these needs before they would be given second-class mailing privileges would be clearly unconstitutional. A requirement that Billy Graham investigate the religious needs of the area before he would be given a license to appear at a local rally would be equally illegal.[9] Yet, the Commission and the lower Court apparently contend that broadcasters are different from newspapers, magazines and local speakers and that the same principles of freedom of speech and press do not apply to each. The Com-

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[8] As a typical example of these letters, see Appendix, p. 8a.

[9] The Broadcast Bureau of the Commission has already taken this position. It has asked that an applicant who proposed to devote 46.8% of the program time of a proposed FM station to religion be required to meet the following issue:

> "To determine whether the program proposals and policies of the Christian Broadcasting Association of New England, Inc. are designed to and would be expected to serve the needs of its proposed service area."

The issue was originally requested by the opposing applicant on the basis of the Commission's decision in the *Suburban* case. The case involves 307(b) issues only and thus is non-comparative insofar as programming is concerned. *Broadcast Bureau's Comment Re North Attleboro's "Petition To Enlarge Issues"*, Docket No. 14601, (Filed May 28, 1962).

mission has contended that this difference has been approved by this Court's ruling in the *National Broadcasting Co.*, case, *supra*. Yet, today, broadcasting is by far the most effective and comprehensive media for the dissemination of information left in the United States. In practically every market, there are more competitive broadcast outlets than newspapers or magazines. In coverage and number of outlets, it far exceeds any other informational source.[10] It is inconceivable that the First Amendment should be construed to protect the few and rapidly dwindling newspapers and magazines from Government control and yet allow the Federal Communications Commission to supervise what can be said to the American people over broadcast stations.

It is equally difficult to believe that the word "censorship" written into the Communications Act to prevent previous restraint by the Government should be subject to such a widely different interpretation when applied to other means of communication. Petitioner was denied a license because the Government did not approve of the way it ascertained the need for its proposed programs. Both the Commission and the lower Court contended that this was just a requirement for a license that was encompassed within the phrase "public interest, convenience and necessity." Such a requirement applied to any other media would be quickly and effectively recognized for what it is—a device to circumvent the specific and unambiguous prohibition of the statute. It is submitted that such an extension of statutory power, which ignores a clear

[10] As of June 30, 1961, there were 650 commercial television stations, nearly 1,100 commercial FM stations and more than 3,700 AM stations in operation. *27th Annual Report*, pp. 4-5.

and unambiguous limitation in the statute, should not be permitted to stand as controlling without the express approval of this Court.

B. Failure to Follow a Decision of This Court

If the Commission and lower Court's interpretation of the First Amendment and Section 326 are correct and the complained of action is not a violation of the protection afforded by these provisions, the action raises another serious and important question of Commission power. The Commission held that it was merely trying to compel Petitioner to find out the needs of the area and then apply its own judgment on how best to meet those needs. Such a requirement has no specific basis in the Communications Act of 1934, as amended, and none is cited but the all-encompassing phrase "public interest, convenience and necessity."

It is submitted that this Court should accept the case for review because of this important new assertion of Commission power and because of the lower Court's failure to follow or even consider the principle established by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 84 L. Ed. 869 (1940).[11] In the instant case, the Com-

[11] The lower Court also ignored its own statement of the same principle in *Easton Publishing Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 33, 35, 175 F. 2d 344, 346 (1949) where it stated as follows:

> "The Supreme Court made clear in its opinion in Federal Communications Comm'n. v. Sanders Bros. Radio Station that Congress intended to make broadcasting a competitive business, and that the usual rules relating to the certification of public utilities do not apply. It said (309 U.S. at 475, 60 S. Ct. at page 697, 84 L. Ed. 869): 'In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without inter-

mission found that there was nothing wrong with the proposed programming, but denied the application because Petitioner had not determined the "needs" of the area to be served in a manner approved by the Commission. The lower Court held that the Commission did no more than require ". . . that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them." Appendix, p. 5a.

Petitioner had prepared, to its own satisfaction, a proposed program schedule which would permit it to operate an FM station successfully in Elizabeth, New Jersey, in competition with the existing media of communications (newspapers, magazines, and other broadcast stations). By denying the application, the Commission has asserted the right to control the business judgment of an applicant, and to require it to investigate the needs of the area and then program to meet the needs of the area *as the Commission feels they should be met.* As a result, it is beyond the scope of

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ference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.' Under that view of the statute, the public interest, convenience and necessity to which the Act refers are served by effective competition among strong competitors. Competition, of course, is between broadcasters on different frequencies covering the same area. *If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements, of the applicant to render service are immaterial.* But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service . . ." (Italics supplied)

credibility to believe that applicants will not propose programming that is in compliance with the programming guides and policy previously announced by the Commission. Moreover, once given the power to require the production of information on needs, it is doubtful that the agency will accept programs that do not conform to these published norms. If the power to require the investigation of needs is upheld, the power to control the commodity to be sold will also be established.

The selection of programming is an essential part of the business of broadcasting since it is *the only service* a broadcaster sells on the open market. Both the Commission and the Court below ignored the clear and explicit admonition of this Court that such supervision is beyond the authority of the Commission:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under the license.
>
> "In contradistinction to communications by telephone and telegraph, which Communications Act recognizes as a common carrier activity and

regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

* * *

". . . the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

* * *

". . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *Federal Communications Commission* v. *Sanders Bros. Radio Station, supra,* at 474, 84 L. Ed. at 873.

The simple fact of the matter is that the Communications Act of 1934, as amended, does not give the Commission authority to regulate the business of

broadcasting, as such, except in certain limited respects, all of which are specifically provided for in the Act and none of which obligate the applicant for a radio broadcast station to determine the needs of the community where he proposes to locate his station or to design his programming to meet those or any other needs. Furthermore, none of the few provisions in the Communications Act, which apply specially to broadcast stations, authorize the Commission to deny an application for an available frequency in the broadcast band because (1) there is no need for the station, (2) because the applicant has not determined community needs, (3) because the applicant has not designed his program to meet these needs, or (4) because the applicant's proposed programs would not be expected to meet community needs, whether or not determined by the applicant. If Congress had intended to impose such obligations on applicants for broadcast station licenses and to empower the Commission to consider such matters in exercising its licensing responsibilities, the legislation would have so provided.

It is not necessary to cite authorities for the proposition that the paramount public policy of the United States as to the relationship of government to business is firmly grounded upon the principle of free and competitive business enterprise and that exceptions to that policy at the Federal level can be made only by Congress. Tampering with a free competitive business by government to the extent of permitting that business to operate only if a public need is established, or of requiring the operator of the business to select his product or service on the basis of pre-established tastes, needs and desires of the public in his com-

munity, places that business at least in a public utility category, if not in a category subject to even more governmental supervision, direction, and control than attaches to public utilities.

Petitioner was not involved in a comparative case with a competing applicant. It was found to be qualified to be a licensee in every respect. It had proposed a program schedule that it felt would obtain public acceptance. It did not desire any further facts or investigation in order to conclude that it was willing to risk its capital and time upon that determination. This Court has said that Congress required no more of a qualified applicant. It is essential that this Court should either reaffirm or delete that interpretation of the Communications Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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